

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Carriage of Digital Television Broadcast)	CS Docket No. 98-120
Signals)	
)	
Amendments to Part 76)	
of the Commission's Rules)	
)	
Implementation of the Satellite Home)	
Viewer Improvement Act of 1999:)	
)	
Local Broadcast Signal Carriage Issues)	CS Docket No. 00-96
)	
Application of Network Non-Duplication,)	CS Docket No. 00-2
Syndicated Exclusivity and Sports Blackout)	
Rules to Satellite Retransmission of)	
Broadcast Signals)	

To: The Commission

**COMMENTS OF
GEMSTAR-TV GUIDE INTERNATIONAL, INC.**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
<i>Summary and Introduction</i>	1
I. DIGITAL TELEVISION AND ITS VIEWERS ARE BEST SERVED BY ENTITLING BROADCASTERS' ENTIRE FREE, OVER-THE-AIR DIGITAL SIGNALS TO MANDATORY CABLE CARRIAGE.	4
II. THE <i>WGN</i> "PROGRAM-RELATED" TEST, IF INTERPRETED PROPERLY IN THE DIGITAL CONTEXT, IS SUFFICIENT TO PROMOTE THE DEVELOPMENT OF A BROAD RANGE OF ADVANCED SERVICES.	7
III. IN THE DIGITAL ENVIRONMENT, A BROAD RANGE OF BROADCAST-SUPPLIED CONTENT AND SERVICES ARE "PROGRAM-RELATED."	9
<i>Conclusion</i>	15

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To: The Commission

**COMMENTS OF
GEMSTAR-TV GUIDE INTERNATIONAL, INC.**

Summary and Introduction

Gemstar-TV Guide International, Inc. ("Gemstar") believes that this proceeding, which is intended to create standards for determining the material subject to mandatory cable carriage in a digital environment, may well prove to be critical to the success of digital television. Without a regime of mandatory cable carriage that extends significantly beyond a single digital program stream, the promises of digital technology may well be blunted, and the ability of broadcasters to compete effectively in a multichannel world may well be seriously harmed. An excessively restrictive view of the material subject to mandatory carriage will leave

cable operators in a position to parlay their gatekeeper status in the analog world into control of the digital television environment.

Digital carriage standards, including the test for “program-related” material, must be developed not in the abstract or by reference solely to principles created in the analog environment, but in terms of the potential that digital television brings to enhancing the public’s interest in a broad range of free television content. Congress intended that digital television should greatly expand the quality and range of broadcast offerings to viewers and at the same time assist in the preservation of a free, universal broadcasting service. And it expected that the Commission would take steps to ensure that these aims were achieved. Thus, to preserve the benefits to viewers of digital’s expanded and enhanced offerings, to preserve the public’s free broadcast service in the digital world, and to guard against harmful anticompetitive conduct from cable operators in the digital age, Congress required the Commission to adapt analog carriage obligations to a digital environment.¹ Now, the Commission confronts critical questions regarding what aspects of the expanded and enhanced digital offerings broadcasters can offer are entitled to mandatory cable carriage and, thus, are able to reach the majority of viewers. In short, the Commission is called upon to answer two questions:

- Will cable subscribers be allowed to enjoy the full range of expanded and enhanced viewing opportunities that broadcasters will be making available in the digital environment?
- Will broadcasters be given a full and protected opportunity to use digital technology to compete for their very survival in a world in which they are confronted by MSO gatekeepers wholly uninterested in their viability?

¹ See 47 U.S.C. § 534(b)(4)(B).

The appropriate solution for viewers, and the one that best advances Congress's goals for digital television, is that the entirety of each broadcaster's free, over-the-air digital signal should be subject to mandatory cable carriage. In that view, Gemstar aligns itself with the Association for Maximum Service Television, the National Association of Broadcasters, the Association of Local Television Stations, Inc., the Walt Disney Company, Tribune Broadcasting Company, and the Fox Affiliates, all participants in this proceeding. That step would vitiate much of the controversy over "program-related" content, would free the Commission from what would otherwise be a difficult referee's role, and would allow broadcasters an unfettered opportunity for content innovation as they work to maximize the potential that digital technology affords them and their viewers.

However the Commission resolves that question, it is similarly clear that for a broad range of the free content and services broadcasters will offer – material designed to enhance the viewing experience, expand upon the medium's ability to entertain, inform and educate, and simplify and improve viewer access and navigation – the Commission already has an analytical framework that could provide necessary protection without burdening MSOs. The relevant statutes and Commission policy establish that "program-related" material is entitled to mandatory carriage. The test for "program-relatedness" taken from *WGN Continental Broadcasting Co. v. United Video Inc.* ("WGN")² is, in our judgment, sound, and it is capable of being attuned to the public interest goals for digital service – so long as the test is applied with the Congressional goals for digital in mind.

² 693 F.2d 622 (7th Cir. 1982).

If viewers are fully to reap the benefits of digital television, at least four types of content embedded in the digital signal should be treated as “program-related”: (1) services that assist viewers to access, understand, navigate and use the content choices available to them (that is, electronic program guides (“EPGs”)); (2) thematically related content offered by broadcasters to help viewers gain insight into and better use and enjoy the broadcaster’s main programming; (3) material provided by broadcasters to retain or attract viewers who are demographically similar to those generally watching the main channels; and (4) “triggers” needed for the delivery of interactive television (“ITV”) services. In a digital environment where broadcasters will be offering large numbers of channels and services – and at the same time will be capable of providing enhancements such as multiple camera angles for the same event, zoned news programs, viewer participation events, and interactive commerce – EPGs will be critically important. EPGs will be the viewers’ maps, gateways, and navigators to the full range of digital choices they will have. The protection of independent EPGs is, thus, especially important because they will prevent MSOs from using the power of navigation to protect their own content and reduce the effectiveness and reach of competitive service offerings.

I. DIGITAL TELEVISION AND ITS VIEWERS ARE BEST SERVED BY ENTITLING BROADCASTERS’ ENTIRE FREE, OVER-THE-AIR DIGITAL SIGNALS TO MANDATORY CABLE CARRIAGE.

When Congress enacted and the Commission implemented the analog carriage requirements, the statute and ensuing rules were relatively clear and specific regarding broadcasting technology. In the analog context, there was very little real disagreement over what constituted a broadcaster’s “primary video, accompanying audio, and line 21 closed caption

transmission.”³ The content of a broadcaster’s analog signal subject to mandatory carriage was largely settled by the Commission’s initial *Report and Order*. When disagreements occurred, they occurred at the margins; even though the Commission adopted in 1993 the three-prong test of *WGN*⁴ as a standard for determining whether any other “program-related” content should be subject to mandatory carriage,⁵ it has not applied the test since it determined in 1994 that Nielsen SID codes were, in fact, program-related material.⁶ Moreover, the Commission has conceded that “no hard and fast definition” of “program-related” should be attempted or maintained.⁷ This proceeding is the first comprehensive look the Commission has taken at the “program-related” concept in a decade.

Despite the specificity of the analog cable carriage statutes, as the Commission now applies the carriage requirements in the digital environment it confronts a technology that was not fully developed when the original cable carriage statutes were enacted. Consequently, there is very little specific statutory guidance. Indeed, the only specific guidance that Congress has provided regarding digital carriage requirements – beyond its instructions to the Commission to adapt its rules to the capacities of the new digital platform – is the requirement of Section 336 of the Telecommunications Act of 1996 that “no ancillary or supplementary service shall have

³ 47 U.S.C. § 534(b)(3)(A).

⁴ *WGN*, 693 F.2d at 626.

⁵ Report and Order, *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast & Signal Carriage Issues*, MM Docket 92-259, 8 FCC Rcd 2965, 2986 (1993) (“*Analog Cable Carriage R&O*”).

⁶ Memorandum Opinion and Order, *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast & Signal Carriage Issues*, MM Docket No. 92-259, 9 FCC Rcd 6723, 6734 (1994) (“*Analog Cable Carriage MO&O*”).

⁷ *Analog Cable Carriage R&O*, 8 FCC Rcd at 2986.

any rights to carriage.”⁸ Aside from this express statement, Congress’s goals for the digital transition and for broadcasting in general are – as the Commission recognizes – “inherent” in Sections 614 and 615 and other parts of the Act.⁹ Accordingly, “[t]he most elegant way to implement Congress’s goals in the DTV environment would be to reinterpret the terms of Section 614 that do not apply to the digital broadcast transmissions and adopt simplified concepts that honor Congressional intent in the new environment.”¹⁰

The simplest formulation of a carriage standard is that a broadcaster’s entire free, over-the-air digital signal, exclusive of ancillary and supplementary services (generally fee-based services), should be entitled to mandatory cable carriage.¹¹ The goal of the must-carry statutes and rules is to create a zone of protection for broadcasters’ content to ensure that cable operators pass it through to viewers. In the digital environment this zone should be broad. “A guarantee of carriage of all of the programming and program-related content in the broadcaster’s digital bit stream will provide broadcasters with the flexibility to provide the panoply of programming

⁸ 47 U.S.C. § 336(b)(3).

⁹ See First Report and Order and Further Notice of Proposed Rule Making, *In re Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission’s Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues, Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, CS Docket Nos. 98-120, 00-96 and 00-2, FCC 01-22, ¶ 4 (rel. Jan. 23, 2001) (“*Digital Must-Carry Order*” and “*Digital Must-Carry FNPRM*”).

¹⁰ Comments of the Association for Maximum Service Television, Inc., CS Docket No. 98-120, at 28 (filed Oct. 13, 1998).

¹¹ See, e.g., Comments of the Association for Maximum Service Television, Inc., CS Docket No. 98-120, at 28 (filed Oct. 13, 1998); NAB/MSTV/ALTV Petition for Reconsideration and Clarification, CS Docket No. 98-120, at 10-16 (filed April 25, 2001); Petition for Reconsideration of the Walt Disney Company, CS Docket No. 98-120 (filed April 25, 2001); Comments of the Tribune Broadcasting Company in Support of the NAB/MSTV/ALTV and Disney Petitions for Reconsideration, CS Docket No. 98-120, at 3-10 (filed June 4, 2001); Comments of the Fox Affiliates in Support of the NAB/MSTV/ALTV and Disney Petitions for Reconsideration, CS Docket No. 98-120 (filed June 4, 2001).

service that DTV makes possible.”¹² Digital television makes extraordinary content innovation not merely a hope but a necessity. Broadcasters and other providers must be encouraged to develop new services without concern for whether what they ultimately develop will reach the 70% of their audience subscribing to cable.

A clear standard that would entitle all of a broadcaster’s free content to carriage would avoid unnecessary debate over the definitions of “primary video” and “program-related” material. It would, moreover, avoid the inevitable strangling of innovation that would occur with the creation of definitions and standards that are based only on known technology and plans. Thus, rather than ask only “What are broadcasters’ plans [for enhanced services]?”¹³ in order to define the scope of “program-related” material, the Commission would leave the field open for innovation. And innovation will occur freely only if it can be followed without fear of a case-by-case battle for carriage – that is, for simple access to the lion’s share of the audience that will receive those offerings through cable service. A clear standard for mandatory carriage of a broadcaster’s entire free, over-the-air digital signal is, in our judgment, the only way to ensure that expanded and enhanced services are efficiently and robustly developed and implemented.

II. THE *WGN* “PROGRAM-RELATED” TEST, IF INTERPRETED PROPERLY IN THE DIGITAL CONTEXT, IS SUFFICIENT TO PROMOTE THE DEVELOPMENT OF A BROAD RANGE OF ADVANCED SERVICES.

We recognize that the Commission has expressed a reluctance to go so far as the broad standard described above.¹⁴ We also recognize that it has expressed the view that the *WGN* test for “program-related” material may effectively protect important broadcaster-delivered

¹² Petition for Reconsideration of the Walt Disney Company, CS Docket No. 98-120, at 4 (filed April 25, 2001).

¹³ *Digital Must-Carry FNPRM* at ¶ 122.

¹⁴ *See Digital Must-Carry Order* at ¶¶ 47-65.

content in the digital world.¹⁵ For at least some purposes, we agree. Properly attuned to the special characteristics and potential of digital television, the *WGN* test is capable of ensuring that cable subscribers ultimately enjoy at least some of the benefits of digital broadcast technology.

When the Commission implemented Section 614(b)(3)(A) of the Communications Act in the analog context, it adopted the three-pronged analysis articulated in *WGN* as the framework for determining whether information is program-related and thus entitled to mandatory carriage under Section 614(b)(3)(A) of the Act.¹⁶ Under *WGN*, material is program-related if (1) the broadcaster intends for it to be seen by the same viewers who are watching the video signal; (2) it is available during the same interval of time as the video signal; and (3) it is an integral part of the video program.¹⁷ The Commission recognized that “there will be instances where material which does not fit squarely within the factors listed in *WGN* will be program-related under the statute.”¹⁸ Thus, application of the *WGN* test was intended to be flexible – to take account of the potential for new services and content that met the goals of the test itself, even if they were not necessarily contemplated at the time of its adoption. In short, the “program-related” test was not meant to be a straightjacket. The overriding requirement is to read the value of any new proposed service against both the nature of the broadcast service it is intended to supplement and the public interest goals inherent in the mandatory carriage rules.

¹⁵ See *id.* at ¶ 61 (“In general, we will continue to use the same factors enumerated in *WGN* . . . to determine what material is considered program-related.”).

¹⁶ *Analog Carriage R&O*, 8 FCC Rcd 2896. The Commission reaffirmed this analytical framework on reconsideration in 1994. See *Analog Cable Carriage MO&O*, 9 FCC Rcd at 6732-33.

¹⁷ See *WGN*, 693 F.2d at 626.

¹⁸ *Analog Cable Carriage MO&O*, 9 FCC Rcd at 6734.

III. IN THE DIGITAL ENVIRONMENT, A BROAD RANGE OF BROADCAST-SUPPLIED CONTENT AND SERVICES ARE “PROGRAM-RELATED.”

Within the three prongs of the *WGN* test – is the material intended to be seen by (1) the same viewers and (2) during the same time as the main programming and (3) is it integral to the main programming – the Commission has ample room to protect the development and delivery of a considerable range of new digital content and services. In either the analog or digital contexts, the first two prongs of the *WGN* test may be applied fairly mechanically; it is perhaps not difficult to determine whether a broadcaster intends for its same viewers to see the “program-related” material and whether they can do so during the same interval of time as the related programming. The question of whether material is “integral” to a video program, however, invites broader consideration – a look not merely at the relationship between the main channels and the content being considered, but also at the goals that Congress and the Commission have set for the service itself.

If digital television is to fulfill the promise it offers all viewers, the Commission must interpret this third prong to encompass a range of services – that is, to find as a general proposition that at least four categories of content and services are “integral” to a broadcaster’s main programming in the digital context: (1) services that assist viewers to access, understand, navigate and use the content choices available to them; (2) thematically related content offered by broadcasters to help viewers gain insight into and better understand the broadcaster’s main programming; (3) material provided by broadcasters to retain or attract viewers who are demographically similar to those watching the main channels; and (4) “triggers” needed for the delivery of ITV services.

First, viewers need tools to assist them to access, understand, navigate and use digital programming and services. Digital television, as the Commission recognizes, “offers the

ability to enhance video programming in a number of ways,”¹⁹ but the potentially dizzying array of channels and enhancements also will accentuate the importance of tools that organize and help viewers navigate among those many choices. Even in the current analog-based environment of 100+ cable channels, EPGs have shown themselves to be extremely important to viewers.²⁰ EPGs provide viewers much more than mere program lists. The Gemstar EPG system, for example, provides a variety of viewer services, including, an organized format categorizing content choices so as to support a viewer’s preferences; extensive information about programs beyond time and channel, including synopses, cast, year produced, and ratings information; and viewing management tools, such as the ability to mark future programs for recording. And in the digital environment, it will aid viewers to find new services, teach them how to use them, and allow them to interact with both the EPG and the content it is describing.²¹ In short, as choices expand in the digital world, EPGs will become utterly indispensable to viewers attempting to enjoy and manage the full range of services and content. EPG information transmitted digitally, then, must be considered “program-related” because the EPG material is integral to the main

¹⁹ *Digital Must-Carry FNPRM* at ¶ 122.

²⁰ See, e.g., Comments of Thomson Consumer Electronics, CSR 5528-Z, at 5 (filed April 13, 2000) (stating that in a recent survey of over 250 buyers of RCA and PROSCAN TVs with Gemstar’s *Guide Plus+* EPG: 77% of respondents cited the added convenience of the guide; 96% volunteered that they used to the guide to see what other programming is currently on; 90% use the guide to look ahead to view upcoming program schedules; 81% responded that they used the guide “before watching any TV programming;” and 60% stated that they used the guide between shows, while commercials are on, or while watching other programming).

²¹ In the *Digital Must-Carry Order*, the Commission appears to have erroneously concluded that EPG information necessarily would be transmitted digitally as part of the PSIP of a broadcaster’s signal. See *Digital Must-Carry Order* at ¶ 64. EPGs may be carried digitally as part of the PSIP or elsewhere in a broadcaster’s digital signal. In either case, it would still be part of a broadcaster’s proffered digital program stream and would still provide information directly related to the content of the digital broadcast signal through which it is being distributed. The mode by which EPG information is carried in no way addresses the question of whether EPGs are related to broadcast programming within the meaning *WGN* test.

television program service. Indeed, it is difficult to imagine material that is more inherently and inextricably linked to the content of television.

As the Commission has recognized, “Congress . . . concluded that [channel positioning and must-carry] regulation is needed to ensure a competitive balance between cable systems and broadcast stations.”²² Without a finding that EPGs are integral to broadcasters’ main programming and, hence, “program-related,” cable operators will be able to reserve the EPG field for themselves, and with it the virtually unfettered power to use their own EPGs to influence viewer access to programming. In establishing the cable carriage requirements, Congress and the Commission recognized that cable operators could use their power substantially to impair the competitive viability of local broadcast stations by repositioning local stations from their customary channels.²³ An MSO’s strong incentive to organize programming on its systems in a manner that biases viewers toward its affiliated programming at the expense of programming competitors will be far easier to effectuate in a digital world where viewers can choose among non-traditional content and services – perhaps often identified by non-channel number indicators (*e.g.*, icons) – and where channel and service brands may be unfamiliar. Biased presentation will thrive on consumer confusion and unfamiliarity. Consequently, it is imperative that the zone of protection for broadcasters’ digital content include EPGs selected by broadcasters and inserted into their free digital signals, which will make presentation decisions

²² See Notice of Proposed Rulemaking, *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast & Signal Carriage Issues*, MM Docket 92-259, 7 FCC Rcd 8055, 8056 (1992) (discussing Congressional intent for must-carry requirements).

²³ 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57.

not with an eye to other ownership interests but rather out of an intent to make the EPG service maximally useful to viewers.²⁴

Second, all material that is similar thematically to the content in the main program stream should be considered as “integral” to that content within the meaning of the “program-related” test. Broadcasters will assuredly offer multiple streams, in data format or otherwise, providing background information, complementary information, or explanatory assistance to viewers interested in their core offerings. In news, the choices might include, for example, background on an event or person, data on an issue, a local application for a national story, generalized statistical information about related problems, zoned coverage, and the like. In fact, the teletext at issue in *WGN* offered, in much cruder and more limited form, precisely such choices and was found, in part because of those choices, to meet the requisite “program-related” standard. Sports content also produces a wealth of thematically related information that could be

²⁴ Exclusion of EPGs from the universe of digital “program-related” material not only would be antithetical to the goals of the cable carriage requirements, but also would undermine the important policy goal of the commercial availability of EPGs, as embodied in Section 629 of the Act and Section 76.1202 of the Commission’s rules. Section 629 requires the Commission to “adopt regulations to assure the commercial availability, to consumers . . . of . . . equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.” 47 U.S.C. § 549(a). In the proceeding to implement this requirement, the Commission determined that its obligation to “assure the commercial availability” of navigation devices extends to EPG equipment, which is used to access “services offered over multichannel video programming systems.” Report and Order, *In re Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, 13 FCC Rcd 14775, 14820 (1998). Accordingly, the Commission declared its commitment to “encouraging the development of the market for the provision of electronic program guide services.” *Id.* Clearly, one the most efficacious ways to encourage the development of the independent EPG market would be to define a program-related standard that ensures the inclusion of digitally transmitted EPG information.

presented outside the main program – for example, additional statistics, different camera angles, scores of other games, highlights and the like.²⁵

Third, material that is intended for the same general audience demographic interested in a station’s main programming choices should be considered to be integral to that programming within the meaning of the “program-related” test. The *WGN* test itself was intended to include material that allows a broadcaster to retain viewers whose attention might otherwise be “flagging.”²⁶ Thus, the test was intended to have the flexibility to allow a broadcaster to make judgments about what material in addition to its main programming may appeal to the same viewers.²⁷

Fourth, “triggers” embedded in digital broadcast signals to initiate and coordinate ITV services should be considered integral to broadcasters’ programming. For example, triggers in a news or sports broadcast or an EPG supporting them could, when prompted, cause the delivery of free interactive material to a viewer. Cable operators have expressed intentions to extend their gatekeeper control to foreclose all such interactive prompts.²⁸ This is particularly troubling because triggers are the critical elements that launch ITV content and link it to the

²⁵ We note also that EPGs contain a large amount of material that is thematically related to content in the main channel. Synopses, lists of cast members, ratings information, and similar material provided by EPGs are intended to help viewers evaluate and enjoy the main programming channels.

²⁶ See *WGN*, 693 F.2d at 627.

²⁷ Again, EPGs facilitate a broadcaster’s ability to present alternative but demographically related material. EPGs allow the transmitting broadcasters to retain viewers by informing them about future programs when the viewer’s interest in current programming flags. They also allow broadcasters to draw viewers to the programming by making detailed program information available to viewers *not* already watching the station.

²⁸ See Comments of the National Cable Television Association, CS Docket No. 01-7, at 5 (filed March 19, 2001) (“[O]perators may wish to keep screens clear of triggers on some types of channels to avoid the clutter of over-commercialization of services.”).

appropriate related video programming. Gemstar has developed its own plans for offering services of this kind,²⁹ and it is reasonable to assume that broadcasters and others will similarly create ITV content that, by agreement with the applicable program providers, is keyed off triggers embedded in video programming but distributed through two-way services that do not necessarily depend for their delivery on cable bandwidth or a cable-provided set-top box. The cable operator's elimination of such triggers from the programming carried on its system would destroy the ability of virtually all non-cable-affiliated ITV providers to compete against cable-controlled content.

* * *

Finally, carrying "program-related" material of the kind we describe above as part of a broadcaster's digital signal would not burden cable operators. For example, there would be no practical burden in carrying the digital information in a broadcaster's signal necessary to facilitate an EPG. "[I]n the digital environment, EPG content like Gemstar's will consume about .0035 (or one-third of one percent) of the 6 MHz bitstream."³⁰ Because EPGs would impose no burden on cable operators, their only real objection to considering digitally transmitted EPGs to be program-related must arise from their desire to extend their gatekeeper role, monopolize the EPG market, and control how consumers manage their television viewing experience. Such protection of a cable operator's own EPG would be flatly inconsistent with Congress's intention that the Commission adapt cable carriage rules to expand, not eliminate, programming

²⁹ See Comments of Gemstar-TV Guide International, Inc., CS Docket 01-7, at 3-5 (filed March 19, 2001).

³⁰ Comments of the Association for Maximum Service Television, CSR 5528-Z, at 3 (filed April 13, 2000).

competition.³¹ Given the absence of a burden on cable operators to carry digital EPG update information, the material's ability to satisfy any reasonable test for program-relatedness, and the critical nature of EPGs in the digital world, there is no reason for the Commission to cabin the scope of what constitutes program-related material so as to exclude digitally transmitted EPG information.

Conclusion

We have established the potential vibrancy of the “program-related” test for digital content and services at least in the absence of a rule that would require mandatory carriage of the entirety of broadcasters’ free, over-the-air digital signals. We urge the Commission to adopt a rule in this proceeding that defines “program-relatedness” against the specific regulatory goals established for digital television – that is, to make clear that the test is intended to create an expansive environment for innovation and service that will provide the public with the benefits of digital service and at the same time ensure that viewers have the

³¹ See, e.g., S. Rep. No. 92, 102d Cong., 2d Sess. 42 (1992); *Analog Cable Carriage R&O*, 8 FCC Rcd at 2988; *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 197-98 (1997).

advantage of independent navigation as they seek to find and ultimately utilize the content and services that they desire.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Stephen A. Weiswasser" followed by a stylized flourish or initials.

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